International Brotherhood of Firemen and Oilers, Local No. 288, AFL–CIO *and* Diversy Wyandotte Corporation, Dekalb. Case 10–CB–5512

May 16, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 10, 1990, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

The Respondent is alleged to have violated Section 8(b)(3) of the Act by refusing to furnish the Employer with information that is necessary and relevant to the processing of a grievance filed by the Respondent on behalf of an employee it represents. The facts, provided in detail in the judge's decision, may be summarized as follows. The Employer discharged Charles Gibson for insubordination when he failed to work mandatory overtime. The Respondent filed a grievance on Gibson's behalf, claiming that Gibson should not have been discharged because he was ill on the day that this overtime was assigned. To substantiate this claim, Gibson produced a doctor's bill reflecting a diagnosis of a prolapsed mitral valve. The Employer asked for further documentation of Gibson's condition in the form of Gibson's doctor's records and hospital records. The Respondent failed to furnish these records after promising to do so, and the Employer filed an unfair labor practice charge. After the unfair labor practice charge was filed, the Respondent's attorney permitted the Employer's attorney to view Gibson's hospital records and offered to give them to the Employer if the Employer agreed to drop the charges leading to the instant complaint.

The Respondent argued that it did not violate the Act. It contended (1) it did not have an affirmative duty to furnish the records because they were not in the Respondent's possession and (2) in any event, the requested information was properly withheld under Georgia's physician-patient privilege.[1] The judge found that the information requested was presumptively relevant but dismissed the complaint based on his further finding that the Georgia physician-patient privilege had not been waived by Gibson, that the Respondent itself did not possess the doctor's records, and that there was no evidence as to the Union's authority with respect to the hospital records in its attorney's possession.

II. RESPONDENT'S OBLIGATION TO SEEK RECORDS NOT IN ITS POSSESSION

The judge found, and we agree, that the medical records sought by the Employer were presumptively relevant, because they were ''essential'' to the Employer's ''follow up'' of Gibson's medical disability claim. Nonetheless, the judge concluded that the Respondent had no obligation to seek records it did not actually possess because there had been no showing the records were within the Respondent's ''control.'' In the context of a grievance resolution process, where the person who is the subject of the grievance has access to the records, we find too limiting this statement of a party's obligation to seek and provide information relevant to the other party's evaluation of the grievance.

A. *Duty to Obtain Information from Others*

We first address the Union's obligation during grievance processing to turn over to the Employer relevant information not in the Union's possession, but which it may be able to acquire. In giving the union the ''discretion to supervise the grievance machinery,'' the Act contemplates that the parties ''will endeavor in good faith to settle grievances short of arbitration.'' *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). Settlements of grievances are often ''facilitated by honest and open disclosure of each party's position and its basis [footnote omitted].'' Elkouri and Elkouri, *How Arbitration Works* 157 (4th ed. 1985). That disclosure involves, among other things, furnishing information that is probably relevant to a disposition of the grievance to the party not in possession of that information. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). In this way, the parties to the grievance procedure have the opportunity ''to evaluate the merits of the claim [footnote omitted],'' and possibly to settle the grievance prior to arbitration. Id. at 438.

We have extended the employer's duty to supply relevant information during grievance processing to situations where the information is not in the employer's possession, but where that information likely can be obtained from a third party with whom the employer has a business relationship that is directly implicated in

[1] ''No physician licensed under Chapter 34 of Title 43 and no hospital or health care facility . . . shall be required to release any medical information concerning a patient except . . . on written authorization or other waiver by the patient . . . provided further, that the privilege shall be waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding.'' Official Code of Georgia, sec. 24–9–40(b).

the alleged breach of the collective-bargaining agreement. *United Graphics*, 281 NLRB 463, 466 (1986). See *NLRB v. Rockwell-Standard Corp*., 410 F.2d 953, 958 (6th Cir. 1969), enfg. 166 NLRB 124 (1967). Although the obligation to supply information during the processing of a grievance is most often stated in terms of the employer's duty under the Act, we have found that a union has a similar duty. *Printing & Graphic Communications Local 13 (Oakland Press)*, 233 NLRB 994, 996 (1977). Thus, a union may have to furnish, or at least attempt to obtain, relevant, requested information that is not in its possession or control but to which it has access. See *Hospital Employees District 1199E (Johns Hopkins)*, 273 NLRB 319, 320, 326 (1984).

B. *The Respondent's Relation to the Grievant*

We next consider whether the Respondent had an obligation under the Act to acquire the doctor's records through Gibson. In our view, whether the Respondent had such a duty depends in part on the relationship between Gibson, who is the subject of the grievance, and the Respondent, which filed the grievance on Gibson's behalf. The General Counsel would have us describe this link between the two as one in which the Respondent is Gibson's ''agent.'' But the connection between Gibson and the Respondent is not so easily defined in terms of common law agency principles. Rather, the legal relationship between a union and the employees it represents is a complex one, shaped in part by the prescripts of Federal labor law and in part by the peculiarities of collective bargaining at the particular employer, including the nature of the collective-bargaining agreement itself. A union owes a duty of fair representation to those unit employees whom it represents and, as the Supreme Court has recently observed, this duty is ''akin to the duty owed by other fiduciaries to their beneficiaries.'' *Air Line Pilots v. O'Neill*, 939 F.2d 1199 (5th Cir.1991). As the Court further observed, the duty has variously been analogized to the duty owed by a trustee to trust beneficiaries, the relationship between attorney and client, and the responsibilities of corporate officers and directors toward shareholders. Id. (Citations omitted.) With respect to grievance representation in particular, the union has a duty to the entire unit that entails protecting the integrity of the grievance and arbitration process itself. *Vaca v. Sipes*, 386 U.S. 171, 194 (1967). Hence, it must represent a grievant in ''good faith and in a non-arbitrary manner,'' with due consideration for its obligations under the Act as the collective-bargaining representative of all the employees in the unit. Id.

Given the nature of this relationship between union and grievant, we find that it is reasonable to require that the Respondent at least attempt to obtain from Gibson his medical records. His records relate directly to the subject of the grievance on which the Respondent is representing him.

Further, the judge found that it was Gibson who, at the third stage of the grievance proceeding, presented a doctor's diagnosis showing that he had a prolapsed mitral valve.[2] Thus, it was only with Gibson's cooperation that the medical defense to his refusal to work the mandatory overtime was raised in the first place. As Gibson's representative for purposes of prosecuting the grievance, the Respondent must have consulted with Gibson in filing the grievance and in the preparation of his case. In these circumstances, we find that the Respondent's relationship with Gibson was sufficiently close to require that, upon the Employer's request of the Respondent for Gibson's medical records, the Respondent was obligated to seek Gibson's assistance in obtaining those records.

We cannot say that the Respondent's asking Gibson for his medical records would be a futile act. No one questions Gibson's ability to obtain his medical records if he chooses to do so. The Respondent has not shown that Gibson's doctor would oppose providing the records to Gibson, or to the Respondent if Gibson asked his doctor for them. Nor has the Respondent demonstrated that Gibson himself would refuse to request the records or to sign a release, if asked to do so. Consequently, in the absence of contrary evidence, we must assume that the records are available for the Respondent's asking.

Thus, at the least, the Respondent should have requested that Gibson sign the medical release. We do not require that the Respondent force Gibson to authorize release of his medical records. Had the Respondent tendered the release to Gibson, Gibson would have had the choice of signing the release form, providing the information himself to the Respondent, or taking the risk that his defense in the arbitration proceeding might be rejected by the arbitrator. By failing to give Gibson that choice, however, the Respondent acted in derogation of its collective-bargaining responsibilities and thereby violated Section 8(b)(3).

As for the hospital records, they are in the possession of the Respondent's attorney, their relevancy has been established, and the Respondent has not come forward with any valid reason they should not be turned over to the Employer.

Accordingly, we find that the Respondent's failure to furnish the hospital records violates Section 8(b)(3)

[2] The judge noted that the Employer's attorney, Thomas Rebel, testified that the Respondent's attorney, Paul Styles, had shown Rebel a copy of Gibson's hospital report. The judge also observed that Styles denied at the hearing that he then had the report. Styles did not dispute, however, that he once had the report, and the judge in his analysis referred to the ''hospital records in the possession of its attorney . . . .'' We consider it reasonable to infer from the Respondent's attorney's possession of the hospital report, a document to which the Respondent itself would not normally have access, that Gibson must have assisted the Respondent in obtaining the report.

unless the Respondent's privilege claim establishes a valid defense. As we find below, it does not.

C. *The Georgia Privilege Statute*

The Respondent's contention that the requested information was privileged under a Georgia statute fails as a defense for several reasons. First, it is hornbook law that a patient's privilege of nondisclosure of his medical records belongs to the patient alone.[3] Thus, the Respondent, which we have found had an obligation to request the information from Gibson, cannot claim the privilege on Gibson's behalf. The judge therefore erred in relying on the Georgia statute. Second, even assuming the Respondent could assert the privilege, it waived the privilege as to Gibson's hospital records when it permitted the Employer's attorney to examine them.[4] Further, we find the judge's analysis of the statute to be flawed. By finding that the statute ''applies,'' the judge appears to have assumed that the statute stands as an absolute prohibition against turning over the medical records that must be affirmatively waived by the patient. We do not read the statute as barring Gibson's doctor in his discretion from providing Gibson's medical records. Thus, section 24–9–40(b) states that no physician ''*shall be required* to release'' information about a patient except ''on written authorization or other waiver by the patient.'' (Emphasis added.) Nothing in the statute precludes Gibson's doctor from voluntarily turning over Gibson's medical records in an appropriate proceeding. The Georgia law only ensures that the doctor not be ''required'' to do so without a waiver. Further, even if the Georgia statute could be read to preclude absolutely the doctor's furnishing the records without the patient's release, we note that the Respondent has not shown that Gibson would not authorize the doctor to do so.[5] In fact, as noted above, the Respondent never requested that Gibson obtain the records from his doctor, or sign the release tendered by the Employer, or that the doctor produce the records to the Respondent. For these reasons, we conclude that the judge erred in relying on a physician-patient privilege in this case.[6]

CONCLUSIONS OF LAW

1. Diversy Wyandotte Corporation, DeKalb is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Firemen and Oilers, Local No. 288, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Employer at its DeKalb, Georgia plant, including truck drivers and plant clerical employees, and excluding all office clerical employees, confidential and managerial employees, professional employees, watchmen, guards, and supervisors as defined in the Act.

4. International Brotherhood of Firemen and Oilers, Local No. 288, AFL–CIO is now, and at all times material here has been, the exclusive representative of all the employees in the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing to furnish Charles Gibson's hospital records to the Employer and by failing to make reasonable efforts to obtain and provide to the Employer Charles Gibson's doctor's records, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be ordered to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act.

---

[3] McCormick, *Evidence* § 102 at 252 (3d ed. 1984).

[4] McCormick, supra, § 103 at 254.

[5] We doubt that, had Gibson refused to sign a waiver on confidentiality grounds, his privacy rights would have overcome the interests of the Employer in obtaining the information. Under *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), if a party asserts privilege or confidentiality as a defense in aid of its refusal to turn over requested information, we must balance the interests of the parties. See also *Howard University*, 290 NLRB 1006 (1988), *Postal Service*, 280 NLRB 685 (1986), and *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982). In weighing the relative merits of the parties' positions, we have held, contrary to the judge, that the party claiming confidentiality—in this case, the Respondent or Gibson—has the burden of proof. *McDonnell Douglas Corp.*, 224 NLRB 881, 890 (1976). Several factors in this case weigh heavily in favor of disclosure. First, because Gibson produced his doctor's diagnosis at the grievance meeting, the diagnosis itself is no longer confidential. Having been made aware of Gibson's medical condition, the Employer understandably sought details, scrupulously limited just to that condition. Second, the Respondent's attorney permitted the Employer's attorney to examine Gibson's hospital records and offered to give the Employer the hospital records if the Employer agreed to drop the charges leading to the instant complaint. Having revealed the hospital records to the Employer, Gibson and the Respondent are hardly in a position to claim they are confidential. Third, the Respondent agreed initially to provide the requested information and did not claim a physician-patient privilege until after the Employer had filed an unfair labor practice charge. In these circumstances, the confidentiality defense appears to be more an afterthought than an actual basis for refusing to supply the requested information. *McDonnell Douglas Corp.*, supra at 889. Fourth, the requested information plainly is necessary to enable the Employer properly and intelligently to process the grievance.

[6] We thus find it unnecessary to pass on the Employer's contention that the Georgia statute is not a physician-patient privilege law but is a physician shield statute that may only be asserted by the physician. We note, however, that the Employer's interpretation has much to commend it. The Georgia Court of Appeals has interpreted the statute as a physician ''shield'' statute. Thus, in *Gilmore v. State*, 333 S.E. 2d 210 (Ga.App. 1985), the court observed that: ''The statute authorized a grand jury or other judicial user to obtain medical records by court order or subpoena. When in answer to such order the doctor releases information, the physician is granted immunity from adverse action by the patient.'' Id. at 211. And in *National Stop Smoking Clinic-Atlanta, Inc. v. Dean*, 378 S.E. 2d 901 (Ga.App. 1989), the Georgia Court of Appeals held that there is no statutorily protected confidential relationship in Georgia between physician and patient.

To remedy the failure and refusal to provide information found to be unlawful, the Respondent shall be ordered to give to the Employer Gibson's hospital records that were or are in its attorney's possession. The Respondent shall also be ordered to make reasonable efforts to obtain Gibson's doctor's records for the Employer. The Respondent may either request Gibson to sign the medical release form submitted by the Employer or it may request Gibson to obtain his doctor's records for the Employer.

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Firemen and Oilers, Local No. 288, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to furnish to the Diversy Wyandotte Corporation, Dekalb, Charles Gibson's hospital records that were or are in its attorney's possession.

(b) Refusing to make reasonable efforts to obtain and provide to Diversy Wyandotte Corporation, DeKalb, Charles Gibson's doctor's records.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Diversy Wyandotte Corporation, DeKalb, the hospital records that were or are in its attorney's possession.

(b) Request, in writing, from Charles Gibson, his doctor's report and provide it or a signed release to Diversy Wyandotte Corporation, Dekalb.

(c) Post at the Respondent's business offices and meeting halls copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director for Region 10 sufficient copies of the attached notice marked ''Appendix'' for posting by Diversy Wyandotte Corporation, DeKalb, if willing, in conspicuous places, including all places where notices to employees are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Diversy Wyandotte Corporation, DeKalb, by refusing to furnish it with relevant and necessary information for the purposes of grievance processing.

WE WILL NOT refuse to furnish to Diversy Wyandotte Corporation, DeKalb, Charles Gibson's hospital records that were or are in our attorney's possession.

WE WILL NOT refuse to make reasonable efforts to obtain and provide to Diversy Wyandotte Corporation, DeKalb, Charles Gibson's doctor's records.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish to Diversy Wyandotte Corporation, DeKalb, Charles Gibson's hospital records in our attorney's possession.

WE WILL request, in writing, from Charles Gibson, the requested doctor's report to provide to Diversy Wyandotte Corporation, DeKalb.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL NO. 288, AFL–CIO

Richard Prowell, Esq., for the General Counsel.
Paul L. Styles, Esq., of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on February 23, 1990, at Atlanta, Georgia. The hearing was held pursuant to a complaint filed by the Regional Director for Region 10 of the National Labor Relations Board (the Board) on January 8, 1990. The complaint is based on a charge filed by the Charging Party, Diversy Wyandotte Corporation, DeKalb (the Employer or the Charging Party) on December 5, 1989, and alleges that International Brotherhood of Fireman and Oilers, Local No. 288, AFL–CIO (the Union) or (the Respondent) has violated Section 8(b)(3) of the National Labor Relations Act (the Act) by refusing to furnish the Charging Party Employer with information requested by the Employer which information is necessary and relevant to a grievance filed by the Union against the Employer pursuant to the terms of a collective-

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

bargaining agreement. The Union has by its answer filed on January 24, 1990, denied the commission of any violations of the Act and has asserted as an affirmative defense that the information sought by the Charging Party is privileged from disclosure under the physician-patient privilege.

On the entire record in this proceeding, and after consideration of the closing statement made by the General Counsel at the hearing and the brief filed by the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE BUSINESS OF RESPONDENT

The complaint alleges, Respondent admits, and I find that the Employer was, and has been at all times material, a Delaware corporation, with an office and place of business located in Tucker, Georgia, where it is engaged in manufacturing industrial chemicals; that during the past calendar year prior to the filing of the complaint, a representative period of all times material, the Employer sold and shipped from its Tucker, Georgia facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia and that the Employer is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent Union admits, and I find that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE BARGAINING UNIT

The complaint alleges, Respondent admits, and I find that at all times material, the following employees have constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

> All production and maintenance employees employed by the Employer at its DeKalb, Georgia plant, including truck drivers and plant clerical employees, and excluding all office clerical employees, confidential and managerial employees, professional employees watchmen, guards, and supervisors as defined in the Act.

The complaint further alleges, Respondent admits, and I find that at all times material, Respondent Union had been, and is, the representative of a majority of the employees in the above appropriate unit for the purposes of collective bargaining, and, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of all employees in the unit for the purpose of collective bargaining.

IV. THE ALLEGED UNFAIR LABOR PRACTICE

The Respondent Union and the Employer are parties to a collective-bargaining agreement, which contains a grievance procedure. In mid-June 1989, the Employer discharged bargaining unit employee Charles Gibson for failure to work mandatory overtime. Following the discharge the Union filed a grievance on his behalf. At the third stage of the grievance proceeding, the employee presented a doctor bill which listed a diagnosis of a prolapsed mitral valve according to the unrebutted testimony of Thomas Rebel, an attorney representing the Employer in the grievance matter. The Employer asked the Union for a copy of the doctor's medical report and a hospital report and, the Union through its attorney Paul L. Styles, has not complied with this request. Rebel was the only witness to testify at the hearing. He testified that Union Attorney Paul L. Styles had shown him hospital records concerning Mr. Gibson, but had not furnished him copies thereof and had further failed to produce the doctor's records. Respondent Union presented no evidence but rather relies on its answer denying any violations of the Act and the denial of Attorney Styles at the hearing that he is in possession of the doctor's records.

In his closing statement the General Counsel relies on *Food & Commercial Workers Local 1439 (Layman's Market)*, 268 NLRB 780 (1984), and contends that as the Union had an agency relationship with the employee in its presentation of the grievance in his behalf, it stood in his shoes and had an obligation to furnish the requested information which was relevant for purposes of bargaining and that by failing to furnish the information the Respondent violated Section 8(b)(3) of the Act. In furtherance of this position the General Counsel also contends that by presenting the doctor's bill at the grievance proceeding with a diagnosis of a prolapsed mitral valve, the Union waived any privilege Gibson may have had as a result of the physician-patient relationship citing *Plasterers Local 346 (Brawner Plastering)*, 273 NLRB 1143 (1984). The Respondent contends that the information was not relevant for the defense of the grievance and further contends that it (the Respondent) was not in possession of the information and that the information was not subject to being divulged as a result of the physician-patient privilege which had not been waived by the employee grievant.

Analysis

Initially, the General Counsel had the burden of establishing a prima facie case of a violation of the Act. It must show that it had made the request for information, that the information was relevant and necessary for purposes of collective bargaining, and that the Union had possession thereof or was in control thereof and refused to provide it. Through the testimony of the Employer's attorney Rebel, the General Counsel established that the request for the information was made. I also find that the information was presumptively relevant as it was an essential follow up to the issue of medical disability as a ground for support of the grievance. It is also undisputed that the Union did not comply with the Employer's request to furnish the doctor's report although the Employer offered to reimburse it for the costs of copying said report and specifically tendered a medical release form to the Union for the employee's signature limited to the medical condition and situation involved in the grievance.

In its brief the Union contends that it was not in possession of the medical report and further that it was not in a position to waive the physician-patient privilege on behalf of the employee grievant. It presented no evidence in its case but relies on the Georgia state law setting out the physician patient privilege as follows:

> No physician licensed under Chapter 34 of Title 43 and no hospital or health care facility . . . shall be required

> to release any medical information concerning a patient except . . . on written authorization or other waiver by the patient . . . provided further, that the privilege shall be waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding.

The Union also relies on *Plasterers Local 346*, supra, cited by the General Counsel as lending support to the proposition that it did not have an affirmative duty to obtain information it did not possess. The Union further relies on *Machinists Local 78 (Square D)*, 224 NLRB 111 (1976), for the proposition that ''Information requests for evidence to be used in arbitrations are analyzed in a different manner from other types of information requests.'' In reliance on this case the Union cites the Board's holding ''that there was no statutory obligation on the union to turn over to the company 'evidence of an undisclosed nature that the possessor of the information believes relevant with respect to its rights in an arbitration proceeding.''' Respondent points out in its brief that in the instant case ''the request only states that the union considers the medical records relevant but makes no concession that in fact the company agrees.''

In the instant case I find the physician-patient privilege applies. I also find the evidence is insufficient to show that the patient waived his claim to the privilege by documenting his condition at the third step meeting. I further find that the Union did not have an obligation to obtain a waiver of privilege from the employee or to obtain and seek records which were not in the possession of the Union.

I find that *Plasterers Local 346* did not involve a physician-patient privilege but rather involved information from a trust fund. In that case the Board stated at page 1144 ''with respect to the information which presumably it did not posses, we find that the Respondent did not have an affirmative obligation to make a reasonable attempt to obtain the information, to investigate reasonable alternative means for obtaining it, or to explain its unavailability.'' In that case the Board also concluded that Respondent violated the Act by its refusal to furnish information it possessed, and noted ''there is no evidence that it is confidential or otherwise privileged.''

Thus I find that *Plasterers Local 346* is supportive of the Union's position in this case as it held that a union was not obligated to furnish information which it did not possess and that absent a showing that the union was in control of the information, it did not have an affirmative duty to obtain the information. Further in its recognition that ''privilege'' was not involved in the instance where it found a violation for failure to furnish information in the union's possession, the Board implicitly recognized the concept that certain information may be privileged. See also *Minnesota Mining Co.*, 261 NLRB 27 (1982), in which the Board in finding a violation by the Employer in refusing to furnish the Union with relevant safety information on its employees noted that ''the Administrative Law Judge found that Local 6-418 had at no time requested the names of any individual employees . . . .'' See also *Plough, Inc.*, 262 NLRB 1095 (1982), in which the Board found the employer had violated the Act by its refusal to supply the union with the results of employees 'physicals, but also that the information must not include individual medical records from which identifying data had not been removed.

Thus, under the circumstances of this case wherein there is no evidence that the Union was in possession of the doctor's reports, no evidence as to what authority the Union had with respect to the hospital records in the possession of its attorney and no evidence that the employee had waived the physician-patient privilege by his tendering of the doctor's diagnosis, I find that the Union did not violate the Act by its refusal to tender to the Employer hospital records in its possession and to obtain and tender to the Employer the doctor's records which were presumably not in its possession.

CONCLUSIONS OF LAW

1. Diversy Wyandotte Corporation, DeKalb is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent International Brotherhood of Firemen and Oilers, Local No. 288, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act by its refusal or failure to disclose and/or obtain medical information and records of employee Charles Gibson to the Employer.

[Recommended Order for dismissal omitted from publication.]